92-808

NO.

Supreme Court, U.S.
FILED
NOV 2 1992
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In the
Supreme Court of the United States

OCTOBER TERM, 1992

LORENZA HOLMES KNIGHT,

Petitioner,

VERSUS

CITY OF NEW ORLEANS AND
WARREN G. WOODFORK,

Respondents

PETITION OF LORENZA HOLMES KNIGHT FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) May a District Court grant Defendants' Motions for Summary Judgment on Appellant's claims by weighing the evidence and making credibility determinations in a Summary Judgment Proceeding?

(2) Can the New Orleans Police Department violate the criminal laws of the State of Louisiana and still be in the "Ordinary Course of Business" under the Federal Wiretapping Statute?

(3) Can a Pre-termination hearing officer be completely biased and prejudge the merits of a case and does a Civil Service employee have a right to a Fair pre-termination hearing?

(4) Does the absence of notice of the charges against a Civil Service employee before termination deprive him of Procedural Due Process?

DESIGNATED LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

(1) City of New Orleans

(2) Warren G. Woodfork

(3) Lorenza Holmes Knight

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1.) The Court below erroneously held that the District Court could weigh the evidence and make credibility determinations when considering a Summary Judgment Motion. This holding is in direct conflict with the holdings of this Court in *Celotex Corp. v. Catrett*, 477 U. S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), of the Eleventh Circuit in *Bass v. City of Albany*, 968 F. 2d 1067 (11th Cir. 1992), and of the Fifth Circuit in *Leonard v. Dixie Well Service*, 828 F. 2d 291 (5th Cir. 1987)

2.) The Court below erroneously held that a city police department could have, as part of its "ordinary course of business", a policy of violating the laws of Louisiana.

3.) The Court below erroneously held that a Civil Service employee does not have a right to a "Fair" pre-termination hearing. This holding is in direct

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conflict with the holdings of this Court in *Hortonville Joint School District No. 1 v. Hortonville Education Assn.*, 426 U. S. 482, 96 S. Ct. 2308, 49 L. Ed. 2d 1 (1976), *Withrow v. Larkin*, 421 U. S. 35 (1976), *Taylor v. Hayes*, 418 U. S. 488 (1974), *Mayberry v. Pennsylvania*, 400 U. S. 455 (1971), with the holdings of the First Circuit in *Acosta - Sepulveda v. Hernandez-Purcell*, 889 F. 2d 9 (1st Cir. 1989), the Fifth Circuit in *Dennis v. S & S Consolidated Rural High School District*, 577 F. 2d 338 (5th Cir. 1978) and *Megill v. Board of Regents*, 541 F. 2d 1073 (5th Cir. 1976), the Sixth Circuit in *Kendall v. Board of Education of Memphis City*, 627 F. 2d 1 (6th Cir. 1980), the Ninth Circuit in *Brady v. Gebbie*, 859 F. 2d 1543 (9th Cir. 1988), and the Eleventh Circuit in *Bass v. City of Albany*, 968 F. 2d 1067 (11th Cir. 1992).

4.) The Court below erroneously held that a Civil Service employee is not entitled to notice of the charges against him before his termination. This holding ignores the holdings of this Court in *Brock v. Roadway Express, Inc.*, 481 U. S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987), *Cleveland Bd. of Education v. Loudermill*, 470 U. S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), *Goss v. Lopez*, 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975), *In Re Ruffalo*, 88 S. Ct. 1222 (1968) and *Green v. McElroy*, 360 U. S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959). This holding is also in direct conflict with binding precedent of the Fifth Circuit in *Glenn v. Newman*, 614 F. 2d 467 (5th Cir. 1980) and with the holdings of the Tenth Circuit in *Miller v. City of Misson*, 705 F. 2d 368 (10th Cir. 1983) and the Eleventh Circuit in *Bass v. City of Albany*, 968 F. 2d 1067 (11th Cir. 1992) and *Everett v. Napper*, 833 F. 1507 (11th Cir. 1987).

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OPINIONS BELOW

The opinion of the Court of Appeals (Appendix C) is not reported. The opinions of the district court are set forth in Appendices A and B.

JURISDICTIONAL STATEMENT

Petitioner's Petition for Rehearing was denied by the Court of Appeals on August 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

This case involves the Federal Wiretapping Statute, 18 U.S.C. 2510, *et seq.*, and the Louisiana Electronic Surveillance Act, LSA/RS 15:1301, *et seq.* Due Process questions are also at issue.

Pertinent provisions of the Federal statute are set forth in Appendix G, *infra*, and pertinent provisions of the Louisiana statute are set forth in Appendix H, *infra*.

CONCISE STATEMENT OF THE CASE

Petitioner's suit alleges violation of *18 USC 2510, et seq.*, unlawful discrimination on the basis of race in violation of *42 USC 2000 (e), et seq.* and deprivation of rights under the Fourteenth Amendment. The District Court granted Summary Judgment in favor of Respondents on the claims pursuant to *42 USC 2000 (e)* and wiretapping *(18 U.S.C. 2510, et seq.* and *LSA/RS 15:1301, et. seq.)* and ordered Respondents to file a Motion for Summary on Petitioner's remaining claims. Respondents did so and this motion was granted by the District Court. Petitioner perfected his appeal.

On the same day oral argument was held, the Panel issued a *per curiam* affirming, in all respects, the holdings of the District Court. Petitioner's Petition for Rehearing and for Rehearing En Banc were denied.

STATEMENT OF FACTS

Captain Lorenza Knight, a highly decorated twenty-four year veteran of the New Orleans Police, was employed

pursuant to Civil Service Rules. On August 6, 1988, Knight was paged by John Reilly who was working on the command desk of the New Orleans Police. Knight returned the page from a pay telephone. Officer Reilly reported a problem with another police officer (Cathy Carter) who had refused to obey a direct order. In the telephone conversation with Reilly (a long-time friend), Knight made some allegedly derogatory statements reflecting upon the race of the police officer in question. This conversation was taped without the knowledge or consent of either (Affidavits, Appendix D and E).

At the same time, Reilly had a similar conversation with Captain James Howley regarding the same incident, and during which conversation Howley used similar language. Reilly had Knight on one telephone line and Howley on another line. This conversation was also taped.

When Reilly asked, Knight told Reilly to write up a complaint form (DM-1) regarding Carter's actions and send the form to her immediate superior for investigation. Since Howley had already ordered Reilly to take that action, Knight told Reilly that no action would be taken on his part. Reilly completed a DM-1 and signed Howley's name.

The Police Department, prior to this incident, had issued nothing in writing to tell its employees that the telephones at the Command Desk were taped. This was done by a recording device located in a remote area known as the "radio shack". Complaint lines coming into the command desk are taped, as is signified by a beeping noise audible to the parties to a conversation. The line on which Knight's conversation was taped is not "beeped". Knight had worked in the Communications Center for a short period of time in the mid-1970's but, at that time, the telephone system was drastically different from the one that existed in 1988 (Affidavit, Appendix E).

Knight did not instigate, nor did he take any part in, an investigation of Carter's actions done by Sergeant Howard, the President of the Black Organization of Police. Despite a clear and flagrant violation of departmental procedures and disobeyance of a direct order from a superior officer, no disciplinary action was taken against Carter.

Howard went to the Communication Center and made several copies of the Knight/Reilly taped conversation. Howard played copies of the tape at meetings of the Black Organization of Police and at the home of Sergeant Israel Fields, another member of the BOP.

Howard then played the tape to Woodfork and left one copy of the tape with him. Woodfork, an admitted admirer of Minister Louis Farrakhan, then referred the matter to Major Salles of the Internal Affairs Division (IAD), had Howard deliver a copy of the tape to that office and ordered Salles to perform an investigation and take a recorded statement from Knight.

Because the tape delivered by Howard was partially inaudible, Salles ordered Sergeant Labry to go to the Communications Center and obtain a copy of the Knight taped conversation. While listening to the tape made by Labry, Salles discovered the recorded conversation between Reilly and Howley. Salles initiated an investigation into Howley's conduct.

Subsequently, Salles ordered Knight to give a statement. The Operations Manual of the Police Department (ASOP 6.0 D) *required* Knight to give a statement, cooperate in any investigation and to sign any written statement. On September 6, Knight went to Salles' office as ordered and demanded that Salles advise him of the nature of the charges against him. Salles refused to do so. However, when Howley was required to give a recorded statement, Salles

advised Howley of the nature of the charges against him. Disciplinary action was taken against Knight, based partially upon this recorded statement.

On September 13, Knight wrote a letter to Woodfork requesting copies of the *evidence* against him, the identity of his accusers and other information that he felt he needed to defend himself. Woodfork, on September 14, refused to provide Knight with any documents other than a copy of Knight's written and recorded statements. Woodfork stated that "the other items you have requested are considered *evidence* in this investigation and, as such, will only be released under the order of subpoena". There is no subpoena power in a disciplinary proceeding before Superintendent Woodfork!

In this same letter, Woodfork advised Knight that he was being investigated on certain charges. By the time of this letter, Woodfork had already made up his mind that Knight was guilty.

Woodfork wrote Knight on October 20, requiring him to appear for a disciplinary hearing and formally advising him of the charges against him. Before the hearing on November 11, Woodfork consulted with the City Attorneys regarding charges of Discrimination that could be brought against Knight. He did not advise Knight of any claim of Discrimination.

On November 14, a black newspaper, *The Louisiana Weekly*, published a lengthy article that quotes verbatim from the Knight/Reilly telephone conversation, quotes "Sources" at the Police Department and quotes a Press Release by Woodfork. *The Louisiana Weekly* got this information and knew about the disciplinary action before Knight did.

On November 15, Woodfork involuntarily retired Knight, finding that Knight had made a public statement, *was guilty of racial discrimination*, and had failed to maintain the standards of service. The charges originally made against Knight were different from those for which he was disciplined. Woodfork admits that only after the hearing before him was a determination made that other charges would be made against Knight.

Howley's recorded conversation was found by Woodfork not to be a public statement. Howley was found to have been "indirectly discourteous", but he had not failed to maintain the standards of service although his statement was almost identical to Knight's.

REASONS FOR GRANTING THE PETITION

1. A DISTRICT COURT MAY NOT WEIGH THE EVIDENCE AND MAKE CREDIBILITY DETERMINATIONS ON MOTION FOR SUMMARY JUDGMENT.

To reach its decision the District Court had to review *all* the evidence, determine what had been told and furnished to Knight, weigh the evidence, make credibility determinations and determine all the facts.

In dealing with Knight's "Liberty Interest" claim (*Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978)), the District Court decided that the statements made about Knight were true. This ignored the fact that the disputed statements were not whether Knight said something, but whether or not Knight had been guilty of discrimination.

The District Court's holding that the wiretapping was made "in the ordinary course of business" and that Knight

had impliedly consented could only have been based upon affidavits furnished by Appellees. The court stated:

> Captain Knight, who previously worked in the Communications Division and, at the time of his retirement, *clearly must have known* that the police department recorded telephone calls placed to the communications desk. Fn. 3.

Knight's and Reilly's affidavits state that they did not know, nor did they consent, to the tapping. Weighing the evidence and making credibility determinations was admitted to by the District Court in footnote 3 of its decision.

The District Court candidly stated the "allegations of plaintiff concerning the lack of knowledge and consent to the taping", does not "refute the evidence". This is a credibility determination and weighing of evidence not within the power of a District Judge. This is a determination for a jury. See, *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 477 U.S. 317, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.* 106 S. Ct. 2505 477 U.S. 242, 91 L. Ed. 2d 202 (1986).

Leonard v. Dixie Well Service, 828 F. 2d 291, 294 (5th Cir. 1987) held:

> The district judge erred in basing his decision on finding Dixie Well's documentary evidence inherently more "reliable" or "accurate" than Leonard's and his co-workers' testimony and sworn statements from memory. The party opposing a motion for summary judgment, with evidence competent under Rule 56, is to be believed; it is for the jury at trial, not for the judge on a pretrial motion, to decide whose evidence is more credible. A judge assessing the "persuasiveness" of evidence presented on a motion for summary

judgment may discount such evidence as unspecific or immaterial, but not as unbelievable.

To have reached its result, the District Court must not have *believed* the evidence presented by Petitioner. Summary Judgment was not appropriate.

2. A CITY POLICE DEPARTMENT'S VIOLATION OF STATE LAW CANNOT BE A PART OF ITS "ORDINARY COURSE OF BUSINESS".

The District Court held that the wiretapping was legal since it was done in the "ordinary course of business".

> The phrase "in the ordinary course of business" cannot be expanded to mean anything that interests a company. Such a broad reading flouts the words of the Statute and establishes an exemption that is without basis in the Legislative history of Title 3. *Watkins vs. L. M. Berry & Company*, 704 F. 2d 577, 582 (11th Cir. 1983).

In *Briggs vs. American Air Filter Co., Inc.* 630 F. 2d 414 (5th Cir. 1980) at 418, we find:

> If the common experience in this country is that under certain circumstances, communications made on office telephones are not listened to by employers or their agents, it cannot be said that an act of "listening in" to such a conversation is "in the ordinary course of business".

Louisiana law determines whether or not the New Orleans Police Department could have tapped the line "in the ordinary course of business". LSA/*RS 15:1301 et seq.*, does not provide for an "ordinary course of business" exception as all police departments, except the state police, are forbidden from engaging in wiretapping.

While no Louisiana Appellate Court has interpreted this statute, the Louisiana Attorney General has issued an Opinion regarding the legality of the Kenner police department's tapping lines. *Attorney General Opinion No. 89-301* states five conditions that must be met:

> 1) All employees must expressly consent to the monitoring;
> 2) Adequate notice must be placed in the room;
> 3) The monitoring must be indiscriminately applied, routinely performed and must not be surreptitious;
> 4) The monitoring must serve legitimate purposes, including but not limited to improving the operations of the department's emergency and investigative services and furthering the administration of criminal justice; and
> 5) The department should also provide phone lines to employees and others on which personal calls may be made without monitoring of any kind.

Briggs, supra, holds that for wiretapping to be legal under the Federal statute (1) the call must be about business, (2) the listening-in must be limited in purpose and time; and (3) the listening-in *must not be a part of a general practice of surreptitious monitoring.*

Here, the listening-in does not meet the second and third requirements of *Briggs*. If it met the third requirement of *Briggs*, it would fail the "indiscriminately applied, routinely performed" provisions of the third requirement of the Louisiana law. Thus, the wiretap involved here *can not* be "in the ordinary course of business" under either Louisiana or Federal law.

The District Court found that Knight had impliedly given his consent. *Watkins, supra*, rejected the argument

that the employee's knowledge of the employer's *CAPABILITY* of monitoring her private conversations was implied consent to the monitoring under federal statutory law.

In *Campiti vs. Walonis*, 611 F. 2d 387 (1st Cir. 1979), state law prohibited taping of Campiti's conversation. Defendants also argued "implied consent". The First Circuit stated, at 393, "this boils down to the proposition that Campiti *should have known* his call would probably be monitored and he, therefore, gave consent". There was no consent because "implied" consent would completely distort the plain words of *18 USC 2511 (2) (c)*.

3. A CIVIL SERVICE EMPLOYEE HAS A RIGHT TO A "FAIR" PRE-TERMINATION HEARING.

The District Court held that:

> Knight, however was not entitled to have his pre-termination hearing conducted by a fair and impartial decision maker.

A public employee facing a due process hearing on charges is entitled to an impartial decisionmaker; not a decisionmaker who admits that he was personally offended and decided that the employee was guilty before his hearing as Woodfork admits he did. See, e.g., *Hortonville Joint School District No. 1 v. Hortonville Education Assn.*, 426 U.S. 482, 96 S. Ct. 2308, 49 L. Ed. 2d 1 (1976); *Taylor v. Hayes*, 418 U.S. 488 (1974); *Mayberry v. Pennsylvania*, 400 U. S. 455 (1971); *Kendall v. Board of Education of Memphis City*, 627 F. 2d 1 (6th Cir. 1980). An impartial decision-maker is a basic constituent of minimum due process. *Megill v. Board of Regents*, 541 F. 2d 1073 (5th Cir. 1976); *Ferguson v. Thomas*, 430 F. 2d 852 (5th Cir. 1970). Fundamental to

the requirements of due process is the opportunity to be heard before a fair and impartial tribunal of some nature, composed of neutral and detached persons. See e.g., *In Re Murchison*, 349 U. S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955). A biased decisionmaker is constitutionally unacceptable. *Withrow v. Larkin*, 421 U. S. 35 (1976).

Where termination of an employee is based on allegations of misconduct, due process requires that there be notice of the charges, a hearing on the merits before an *impartial person or body*, a chance to be represented and confronted with witnesses, and a decision based on some substantial evidence. *Buggs v. City of Minneapolis*, 358 F. Supp. 1340 (D. C. Minn. 1973). See also *Dennis v. S & S Consolidated Rural High School District*, 577 F. 2d 338 (5th Cir. 1978). and *State of Mo. Ex Rel. Gore v. Wochner*, 475 F. Supp. 274 (E. D. Mo. 1979).

In *Brady v. Gebbie*, 859 F.2d 1543 (9th Cir. 1988), the Ninth Circuit dealt with a case very similar for its lack of an impartial hearing. Dr. Brady, a state medical examiner, was accused of selling body parts to finance parties in the morgue. Brady then told his supervisor, Gebbie, that he had a bank account which he had started while a county coroner. The unsolicited funds for the account came primarily from small amounts of money forwarded to the coroner's office by the National Pituitary Foundation. The funds were used for various amenities for the Medical Examiner's Office. Gebbie refused Brady's offer to resign at that time, but agreed to meet with him after she met with the State Attorney General.

Gebbie met with Brady later and again refused his offer to resign. She then gave him a letter of suspension and informed him that he was suspended without pay pending an investigation into charges of misuse of public funds.

Gebbie also issued a press release in which she stated derogatory information.

After the suspension, Brady was the subject of extensive and unfavorable press coverage. The Attorney General later issued a report which concluded that criminal sanctions against Brady were not warranted. Brady and his attorneys then met with Gebbie. After Brady refused to resign, Gebbie handed him a letter of proposed termination charging him with violating various state and departmental policies and accounting procedures. The letter also stated that on October 2, 1985, Brady would have the opportunity to come to Gebbie's office with his attorney to respond to the charges, and present mitigating or rebuttal information. Gebbie then issued a press release about the proposed termination.

The meeting was held and, at that time, Gebbie asked Brady for specific information regarding whether he had used particular state-owned equipment when he performed private autopsies. Brady stated that in order to answer her questions he needed time to check his records. He asked for a continuance to gather the necessary information to outline his response to the charges. Gebbie denied the request. She also denied Brady's request for a fair and public hearing. The next day Gebbie discharged Brady. Gebbie also issued a press release in which she made further derogatory statements about Brady.

Brady subsequently filed suit in the United States District Court for the District of Oregon, pursuant to *42 U.S.C. 1983*, for monetary damages and reinstatement alleging a lack of due process.

The Ninth Circuit noted that the fundamental requirement of due process is an opportunity to be heard at a

meaningful time and in a meaningful manner (*Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976)) and that, at a minimum, due process requires notice and a hearing where the individual has a meaningful opportunity to confront the evidence against him. *Vanelli v. Reynolds School Dist. No. 7*, 669 F. 2d 773 (9th Cir. 1982).

The Ninth Circuit had no difficulty in affirming the jury finding as there was sufficient evidence presented in the case from which a jury could reasonably find that Gebbie did not give Brady even *minimal* due process, *i.e.* an opportunity to be heard in a meaningful manner or an opportunity to clear his name when it stated, at page 1555:

> A jury could reasonably infer that even if the October 2, 1985 meeting constituted a "hearing", it did not comport with due process.
>
> * * *
>
> A jury could infer from this that the "hearing" was a mere formality and that Gebbie did not give Brady a "meaningful opportunity" to clear his name or be heard. See *Matthews*, 819 F. 2d at 893-94: *** "[d]ue process of law [is not present] where the state has gone through the mechanics of providing a hearing, but the hearing is totally devoid of a meaningful opportunity to be heard") (quoting *Washington v. Kirksey*, 811 F. 2d 561, 564 (11th Cir. 1987)).

Knight's hearing was nothing more than a farce designed to fulfill the pretext that a due process hearing was given. Woodfork admitted in his deposition he had already made up his mind that Knight was guilty *before Knight's hearing was held*. Woodfork refused to give Knight any of the evidence that was to be used against him, except the

Knight statement to IAD.

4. A CIVIL SERVICE EMPLOYEE IS ENTITLED TO NOTICE OF THE CHARGES AGAINST HIM BEFORE HIS TERMINATION.

Before a "tenured public employee" is discharged, he is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. *Cleveland Bd. of Education v. Loudermill*, 470 U. S. at 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). The fundamental requirement of due process is an opportunity to be heard at a meaningful time and in a meaningful manner. *Matthews, supra*. Due process requires that a person receive notice of charges brought against him so that he may understand why he is being investigated and have an opportunity to prepare a response. *Wolff v. McDonnell*, 418 U. S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

In *In Re Ruffalo*, 88 S. Ct. 1222 (1968), an attorney was charged in state court disciplinary proceedings with two counts of soliciting FELA plaintiffs as clients through an agent, Mr. Orlando. At the hearing, both Orlando and Ruffalo testified that Orlando did not solicit clients for Ruffalo but merely investigated FELA cases for him.

The charges were amended, during the hearing, based on Ruffalo's hiring Orlando to investigate Orlando's own employer, a railroad. Ruffalo was subsequently disbarred based upon a charge that was not among the original charges. As this Honorable Court noted at page 1226:

> *The charges must be known before the proceedings commence.* They become a trap when, after they are underway, the charges are amended on the basis of

> testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> * * * *
>
> This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process. (emphasis added)

Knight had no knowledge of the charge of Discrimination until after his hearing. He had no opportunity to defend himself. He was deprived of Due Process. It was that very deprivation of Due Process that allowed Woodfork to obtain the most important evidence used by him to make his decision.

The Operations Manual of the New Orleans Police Department and *LSA/RS 40:2531, et. seq.*, provide that the officer shall be advised of the nature of the charges against him at the beginning of the interrogation. When a governmental body adopts procedures relating to such interests as employment, it is obliged under federal law to comply with these procedures. *Service v. Dulles*, 354 U. S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957). Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. *Morton v. Ruiz*, 415 U. S. 199, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974).

Providing post-deprivation remedies are not sufficient. In *Loudermill, supra*, this Court announced an important principle of law at 470 U. S. 545-546:

> The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to

present his side of the story.

In *Greene v. McElroy*, 360 U. S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959), Greene was discharged from his employment solely as a consequence of the revocation of a security clearance. Prior to a post-termination hearing, Greene received a letter informing him that the action was based on certain information. When he appeared at the hearing, he was questioned in detail concerning his background and the information disclosed in the termination letter.

At this hearing, and subsequent ones before other hearing boards, the Government used "confidential investigations" that were compilations of statements taken by an investigatory agency and various other "evidence" that was refused to Greene. Greene had no opportunity to confront and question persons whose statements reflected adversely on him or to confront the government investigators who took their statements.

Greene was subjected to an intense examination during hearings, and during his examination at the final hearing, this hearing board injected new subjects of inquiry and make it evident that it was relying on "evidence" not made available to Greene.

Almost three years after his termination, Greene received a letter from the Government that stated that doubts concerning Greene's credibility affected the Board's evaluation of his trustworthiness and that only trustworthy persons could be afforded access to classified information. This was the first time Greene was charged or found to be untrustworthy.

As this Court noted, at pg. 496:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.

Woodfork refused to give Knight any evidence except the statement he gave to Salles. As in *Greene, supra*, this case is one of a fact determination rendered after a hearing which failed to comport with traditional ideas of fair procedure.

In *Brock v. Roadway Express, Inc.*, 481 U. S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987), Roadway discharged one of its drivers alleging that he had disabled several lights on his assigned truck in order to obtain extra pay while waiting for repairs. The driver filed a complaint with the Department of Labor claiming he was discharged as a "whistleblower" in violation of a Federal statute. OSHA notified Roadway of the grievance and an OSHA field investigator obtained statements substantiating the driver's retaliatory discharge claim. Roadway was afforded an opportunity to meet with the investigator and submit a written statement detailing the basis for the driver's discharge, but it was not provided with the names of the other witnesses or the substance of their statements. Subsequently, the Secretary of Labor ordered the driver reinstated with back pay. Roadway then filed suit claiming that the Secretary unconstitutionally deprived Roadway of procedural due

process by failing to provide Roadway with the substance of the evidence supporting the driver's complaint.

This Court held, at page 264:

> We conclude that minimum due process for the employer in this context requires notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet the investigator and present statements from rebuttal witnesses.

Citing *Loudermill, supra*, and *Arnett v. Kennedy*, 416 U. S. 134, 94 S. Ct. 1633, 40 L. Ed 2d 725 (1974), this Honorable Court stated:

> These cases reflect that the constitutional requirement of a meaningful opportunity to respond before a temporary deprivation may take effect entails, at a minimum, the right to be informed not only of the nature of the charges but also of the substance of the relevant supporting evidence.

Woodfork refused to provide Knight with any information or documents except the statement Knight gave to IAD.

Even high school students faced with suspensions of less than ten days are entitled to more Due Process than was given Knight. In *Goss v. Lopez*, 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975), several students were suspended for various infractions. This Court held, at page 581:

> Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be

> given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.

This Court went on to hold, at page 582:

> We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is.

The Eleventh Circuit has recently had an occasion to consider a case involving another police officer that is, in many respects, identical to the facts in this case. In *Bass v. City of Albany*, 968 F. 2d 1067 (11th Cir. 1992), Officer Bass was suspended without pay after an arrested suspect alleged that Bass had used excessive force in making the arrest. The Internal Affairs Department of the Albany Police had notified Bass of its investigation and interviewed him to get his version of the events. The police chief called a meeting with Bass in order to give Bass a second chance to tell his side of the story. Bass was then suspended without pay pending a pretermination hearing on charges of violating a departmental policy which proscribed the use of excessive force.

At his pretermination hearing Bass was given another opportunity to present his side of the story. Afterwards, the city manager terminated Bass upon finding a violation of the policy against excessive force but, additionally, citing other factors as reasons for the termination including numerous violations of city policies and procedures concerning filing of reports, use of firearms and the conduct of high speed chases. Bass was not notified of these charges until he was terminated.

The District Court dismissed Bass' due process claim upon Motion for Summary Judgment. The Eleventh Circuit reversed, citing *Miller v. City of Mission*, 705 F. 2d 368 (10th Cir. 1983), because the termination was partially based on reasons not included in the notice to Bass. The Eleventh Circuit held that there was an absence of Due Process.

Despite the fact that Knight was never told, before being found guilty, that he was charged with Discrimination, the District Court and the Fifth Circuit were of the opinion that there was no Due Process violation. This is clearly not in accordance with the law as pronounced by this Honorable Court and the other Circuit Courts of Appeal. This holding is further in conflict with binding precedent of the Fifth Circuit in *Glenn v. Newman*, 614 F. 2d 467 (5th Cir. 1980).

CONCLUSION

This Court should grant this Petition for a Writ of Certiorari and reverse the lower court holdings. Granting Summary Judgment in this case flies in the face of *Anderson* and *Catrett*. Since the violation of the criminal laws of Louisiana *(LSA/RS 15:1301, et seq.)* can not be "in the ordinary course of business" of the New Orleans Police Department, holding this wiretapping to be legal may be construed as a sanctioning of illegal acts and is an overruling of *Briggs* by a Panel of the Fifth Circuit. This holding is in conflict with the holding of the Eleventh Circuit in *Watkins* and the First Circuit's holding in *Campiti*.

Further, allowing this holding to stand means that a Civil Service employee has no complaint if his pre-termination hearing officer is so biased and prejudiced as to be incapable of providing a fair hearing.

Finally, the holdings below mean that the employee is not entitled to know the charges against him before he is terminated. These holdings eviscerate Due Process as pronounced in numerous cases by this Honorable Court and the other Circuit Courts of Appeal.

Respectfully submitted,

POINDEXTER & OXNER

By: _____

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ATTORNEYS FOR PETITIONER,
LORENZA HOLMES KNIGHT

CERTIFICATE OF SERVICE

I hereby certify that I have on this 30th day of October, 1992, served three copies of the foregoing petition upon the following, by placing same in the United States mail, properly addressed and first class postage prepaid:

(1) Counsel for Defendants,
City of New Orleans and
Warren G. Woodfork

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DALE W. POINDEXTER

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LORENZA KNIGHT	CIVIL ACTION
VERSUS	NO. 89-3409
CITY OF NEW ORLEANS and WARREN G. WOODFORK	SECTION "K" (1)

MEMORANDUM AND ORDER

Defendants, the City of New Orleans (the "City") and Superintendent of Police Warren G. Woodfork ("Woodfork"), filed a motion to dismiss the claims of plaintiff made pursuant to title 42, United States Code, Section 2000 (e) (Doc. 38). Further, in response to a motion for partial summary judgment filed by plaintiff (Doc. 60), the defendants also filed a cross -motion for partial summary judgment (Doc. 67), seeking judgment as a matter of law on plaintiff's federal wiretapping statute claims. The Court also raises sua sponte plaintiff's claims under the Fourteenth Amendment to the U.S. Constitution and Title 42, United States code, Section 1983. Having reviewed the memoranda in support, the oppositions, the records, and the applicable law, the Court finds the motions filed by defendants to have merit but further briefing to be necessary with respect to plaintiff's remaining claims.

BACKGROUND

This action arises out of the involuntary retirement of plaintiff Lorenza Knight ("Knight") on November 15, 1988,

from the New Orleans Police Department. Plaintiff's involuntary retirement allegedly took place as a result of derogatory statements made concerning another police officer's race, which were recorded by the police department's telephone monitoring system. Because of the issues involved in these motions, the Court finds it useful to provide a thorough factual and procedural history of this case.

The record indicates that plaintiff worked continuously as a police officer from 1964 until November 1988, except for a short break of three months in 1966 when he worked for a private sector company. During his tenure with the New Orleans Police Department, plaintiff served in a variety of positions and, at the time of his involuntary retirement, had reached the rank of captain. One such position in 1977 included being a platoon commander of the police department's Communications Division. According to plaintiff's deposition testimony, this division had the responsibility of acting as an information center, receiving calls, and dealing with the media. Plaintiff testified in his deposition that he did not know whether the police department taped routine phone calls, but he did know that the Communications Division taped radio transmissions.

The specific incident that gave rise to this cause of action occurred on August 6, 1988. As a police captain, plaintiff worked as a field supervisor and acting superintendent in the absence of the police superintendent, Warren G. Woodfork.

Upon receiving a page on his beeper, plaintiff called Officer John Reilly at the Command Desk of the police department's Communications Division. Captain Knight apparently placed this call from a public telephone booth at approximately 11:30 p.m. on August 6th.

The transcript of the call between Officer Reilly and Captain Knight indicates a conversation about the conduct of another police officer. During this conversation, the following exchange took place after plaintiff asked about the other officer's race:

Knight: Black?

Reilly: Yes. She's not usually like that . . .

Knight: They are usually like that John, it's a fucking nigger.

Reilly: Uh huh . . .

Knight: It's a shame to say it but a fucking nigger is a nigger and ain't worth a shit, you know.

* * *

Knight: I want paper work typed up on it explaining in detail exactly what she did and we'll send it down to the district in the form of a complaint.

Reilly: Okay.

Knight: The bitch is not going to get away with this kind of stuff, you know, I don't give . . . I'm tired of these fucking niggers.

The police department contends that it routinely monitors the telephone lines to the Command Desk and, thus, the remarks made by Captain Knight were recorded.

An internal investigation of the other officer's conduct

on the night of August 6, 1988, resulted in the investigating officer reviewing the taped communications surrounding that event. The investigating officer turned a cassette tape of this conversation over to his supervisor, which resulted in disciplinary charges being brought against plaintiff under several police regulations. The record indicates that Superintendent Woodfork provided notice to plaintiff of the disciplinary charges against him and held a hearing on November 7, 1988, for plaintiff to respond to these charges. Subsequently, in a letter dated November 15, 1988, Superintendent Woodfork involuntarily retired plaintiff from the police department, which took effect on that date.

Plaintiff appealed the superintendent's decision to the New Orleans Civil Service Commission (the "Civil Service Commission") on November 17, 1988. In his initial petition to appeal, Captain Knight does not make any allegations of discrimination stemming from the personnel action against him. On February 13, 1989, plaintiff, however, amended his petition to appeal and included a charge of racial discrimination. The Civil Service Proceedings apparently have been continued pending a resolution of state court proceedings.

Captain Knight filed suit in the Civil District Court for the Parish of Orleans, State of Louisiana, on November 18, 1988. In his initial petition, plaintiff sought a temporary restraining order to prevent certain actions by the defendants in that matter with respect to the tapes of his conversation above. On February 28, 1989, plaintiff filed an amended petition in the state court action, seeking damaged in excess of $600,000.00, making other claims to include invasion of right to privacy and intentional infliction of emotional distress.

The Equal Employment Opportunity Commission (the

"EEOC") also received a complaint from plaintiff on July 28, 1989. On August 10, 1989, the EEOC issued a right to sue letter to plaintiff. In this letter, the EEOC notes that it has dismissed plaintiff's complaint because of its untimely filing.

Plaintiff filed the complaint in the instant action on August 2, 1990. In the complaint, he alleges causes of action under Title 18, United States Code, Section 2520, the federal wiretapping statute. On August 30, 1990, plaintiff amended his complaint to include a claim under Title 42, United States Code, Section 2000e, which prohibits unlawful discrimination based upon race. Finally, plaintiff filed a Second Amended Complaint on November 9, 1988, and alleged causes of action under the Fourteenth Amendment to the U. S. Constitution and Title 42, United States Code, Section 1983. The Court now turns to the merits of the motions before it and plaintiff's other claims against the defendants.

DISCUSSION

1. Plaintiff's Racial Discrimination Claims

Defendants first contend that this Court lacks subject matter jurisdiction because plaintiff failed to timely file his complaint with the EEOC. In opposition, plaintiff argues that the proceedings before the New Orleans Civil Service Commission worked to equitably toll the time for filing. The Court, however, finds that the law does not support plaintiff's argument of equitable tolling.[1]

The U. S. Supreme court in McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973), established the following two jurisdictional requirements for filing a suit based on racial discrimination: (1) the complainant must timely file charges of discrimination with the EEOC, and (2) the complainant must receive and act upon the EEOC's right to sue notice. Id. at 798. In the instant suit, defendants contend that plaintiff failed to satisfy the first requirement above.

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[1]The Court does not reach the merits of plaintiff's discrimination claim in this decision but finds it necessary to comment briefly on such claim. In essence, plaintiff alleges that, because Superintendent Woodfork chose to involuntarily retire him as a result of racially-prejudiced comments, the defendants should be held liable for discrimination. The Court, even upon a cursory examination of the facts in this case, notes that the action taken by Superintendent Woodfork probably would be supported by the evidence at a trial. While the superintendent's decision may have been harsh, the comments made by Captain Knight about another police officer, considering his position of responsibility within the police department, provided ample cause for Superintendent Woodfork's decision.

The federal enforcement provisions for charges of racial discrimination by an employer pursuant to Title VII may be found in Title 42, United States Code, Section 2000e-5. The relevant portion of this statute provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice, occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. 2000e-5(e). In the instant action, defendants claim that plaintiff should have filed his claim with the EEOC prior to 180 days from November 15, 1988. Plaintiff, however, argues in opposition that he should be permitted the 300-day filing period because he initially filed charges with the New Orleans Civil Service Commission and such filing subjects the timeliness to equitable tolling.

The Court first notes that, under the relevant case law, the statutory time period for filing a discrimination claim

with the EEOC constitutes a statute of limitations defense rather than a jurisdictional one. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982); see Coke v. General Adjustment Bureau, Inc., 640 F. 2nd 584, 594, (5th Cir., Mar. 1981). The Supreme Court's holding in Zipes, therefore, subjects the filing requirements to waiver, estoppel, and equitable tolling. Zipes, 455 U. S. at 393. See generally 2 A. Larson & L. Larson, Employment Discrimination 48.13 (d) (1) - 48.13 (d) (2) (discussion of waiver, estoppel, and equitable tolling). Thus, the Court must analyze whether plaintiff's filing of an appeal with the New Orleans Civil Commission should permit him to assert the claim of equitable to tolling and, hence, allow him to benefit from the section's 300-day filing period.

The Court finds, that as a matter of law, the New Orleans Civil Service Commission does not qualify as "a State or local agency with authority to grant or seek relief" from discriminatory practices. The EEOC's regulations specifically list those state agencies and local agencies that delay the time period for filing with the EEOC. The Court finds neither the New Orleans Civil Service Commission nor any other Louisiana state or local agency listed in these regulations. 29 C.F.R. 1601.74 (1990); see Dyer v. Parish of Jefferson, 619 F. Supp. 284, 286 (E.D. La. 1985). Moreover, plaintiff does not allege in any of the pleadings, and the Court finds no authority, that this local agency may grant or seek relief from discriminatory practices as required by section 2000e-5 (e).

The proceedings before the Civil Service Commission represent plaintiff's appeal pursuant to his contractual rights as an employee of the City of New Orleans. See Dyer, 619 F. Supp. at 287. Such proceedings to determine whether his contractual rights have been violated do not constitute the type contemplated in the discrimination statute to toll its time requirement. In fact, the Supreme Court has held

that the legislative history of Title VII clearly permits a party to pursue his rights independently under federal and state statutes. Alexander v. Gardner-Denver Co., 415 U. S. 36, 48 (1974). Plaintiff, therefore, did not preclude himself from filing with the EEOC by first appealing to the Civil Service Commission. No legal or other barrier prevented Knight from making claims with the EEOC and, hence, the Court cannot allow plaintiff the benefit of the 300-day filing period under section 2000e-5 (e).2

The Court, having considered the arguments of counsel in light of the relevant law, holds that plaintiff may not maintain his claim of discrimination in this suit as a matter of law. The undisputed fact that plaintiff failed to file his claim with the EEOC within the 180-day time period allowed under law precludes him from asserting a claim of discrimination in this suit.

2. Plaintiff's Illegal Wiretap Claim

Defendants also filed a cross-motion for summary judgment in response to plaintiff's motion for partial summary judgment, seeking this Court's determination on the legality of the telephone recording at issue. Upon a review of the pleadings, the relevant facts, and the applicable law, the Court finds no material facts in dispute to preclude summary judgment as a matter of law and holds the telephone recording to have been legal.[2]

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[2]Because the Court finds the recording in this matter to have been legal, it does not reach the issue of whether defendants may be held liable in damages for allegedly releasing the recording's contents to the public. The Court will leave this issue to the discretion of the state judge under the relevant state law.

The Court notes that "18 U.S.C. 2520 provides a civil cause of action and statutory damages to individuals whose wire or oral communications are intercepted." Briggs v. American Air Filter Co., 630 F. 2d 414, 416 (5th Cir. 1980); see 18 U.S.C. 2520. In the instant action, plaintiff alleges that he should be entitled to such damages because of the police department's recording of his conversation. Defendants, however, aver that, because an exception to this statute applies in this action, plaintiff's claim should be dismissed.

Defendants argue that the "ordinary course of business" exception of Title 18, United States Code, Section 2510 (5) (a) (ii) applies in this case. Section 2510 (5) (a) (ii) provides:

> (5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than--
>
> > (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, . . . (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties . . .

18 U.S.C. 2510 (5) (a) (ii) (emphasis added). This exception, therefore, clearly excepts the police department from the provisions of the federal wiretapping statute, if the Court should find the recording of plaintiff's conversation to have taken place in the ordinary course of the police department's business.

The Fifth Circuit in Briggs addressed the issue of a telephone conversation monitored in the "ordinary course of business" and upheld the lower court's dismissal of the

plaintiff's claims in that case. Briggs, 630 F. 2d at 420-421. In reaching its conclusion that a supervisor had not listened illegally to an employee's telephone conversation, the Fifth Circuit stated:

> Once the conclusion that a listening-in authorized by neither of the parties to the communication can never be "in the ordinary course of business" is rejected, the proper resolution of this case becomes relatively easy. If Congress intended to authorize any type of interception not consented to by a party to the communication, as we conclude it did, this is it. First, the plaintiffs themselves submitted an affidavit stating that this was a business, not a personal, call . . . Second, . . . [the] act of listening-in was limited in purpose and time . . . Third, the act of listening-in was not part of a general practice of surreptitious monitoring.

Id. at 420 (citations and footnotes omitted). Upon an examination of facts before the Court, the Court finds Briggs to support a conclusion that Congress also did not mean to preclude the type of monitoring that took place in this action.

The Court finds the decision in Jandak v. Village of Brookfield, 520 F. Supp. 815 (N. D. Ill. 1981), to be particularly instructive. In Jandak, the U.S. District Court for the Northern District of Illinois held that

> routine, nonsurreptitious, recording of a police investigative line which results in the recording of a conversation of an officer misusing the line for private purposes, where the officer should have known that the line was monitored, was in the ordinary course of the police chief's duties as a law enforcement officer and is exempted from the [federal wiretapping] statute by Section 2510 (5) (a) (ii).

520 F. Supp. at 825. The police department in Jandak had installed a telephone system much like the one possessed by the New Orleans Police Department in that it recorded nine out of ten lines and allowed personal calls on the tenth line. Moreover, the eighth line did not have an audible beeping device, which alerted parties to the recording of their conversations.

The instant matter, in light of the courts' rulings in Briggs and Jandak, provides a more persuasive case for the application of the "ordinary course of business" exception. Captain Knight, who previously worked in the Communications Division and, at the time of his retirement, clearly must have known that the police department recorded telephone calls placed to the communications desk.[3]

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[3]The testimony of Officer John Reilly before the New Orleans Civil Service Commission on June 12, 1989, confirms that, for at least twenty-one years, the police department taped the phones in the Communications Division and most police officers knew about his taping. Doc. 67, Ex. 3. Furthermore, defendants offer the affidavit of Captain James P. Treadway of the New Orleans Police Department to support its contentions concerning plaintiff's knowledge of the recordings. Doc. 67, Ex. 3. In this affidavit, Captain Treadway states that, since 1975, all police officers assigned to police communications receive an instruction about the taping of all telephone instruments, with the exception of one phone for personal calls. The allegations of plaintiff concerning the lack of knowledge and consent to the taping of this particular conversation do not create a material issue of fact to preclude summary judgment nor refute the evidence before the Court.

Further, unlike the officer in Jandak, the conversation that took place between Captain Knight and Officer Reilly clearly involved police business. Finally, the investigating officer obtained Captain Knight's comments during the course of a routine investigation into charges of misconduct levied against another police officer. The Court, under the circumstances present, finds the taping of plaintiff's conversation to have been in the "ordinary course of business" of the New Orleans Police Department.[4]

The Court further holds, that as a matter of public policy, the New Orleans Police Department and other police departments must be protected against suits of this nature.

Congress, in prohibiting certain monitoring of oral and wire communications, could not have meant to preclude the sort of activity complained of by plaintiff. See Briggs, 630 F. 2d at 420. Police departments have a legitimate interest in the efficient operation of their communications activities. The monitoring and taping of telephone lines in the Communications Division of the New Orleans Police Department furthers this interest. If this Court were to allow plaintiff to maintain his claim in this regard, the

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[4]Plaintiff contends that statutory provisions under Louisiana law prohibit a police department from recording telephone conversations. The Court, however, finds that it first must view plaintiff's allegations under federal law to properly determine whether jurisdiction may be exercised. Furthermore, in light of an opinion of the Attorney General for the State of Louisiana on the state statute, the Court expresses doubt that his claims will succeed under state law. Op. Att'y Gen. No. 89-301 (La. Dec. 14, 1989). By dismissing plaintiff's federal claims, the Court, however, leaves this issue to the discretion of the state court judge who will consider plaintiff's claims in that proceedings.

clear mandate of Congress in this area would be contravened.

The Court, therefore concludes that no material fact in dispute precludes summary judgment as a matter of law on plaintiff's claims under Title 28, United States Code, Section 2520, and all related statutes. As such, the Court must dismiss the plaintiff's claims in this regard.

3. Plaintiff's Due Process Claims

Plaintiff, in his second amended complaint, alleges that the defendants violated his rights under the Fourteenth Amendment to the U. S. Constitution and title 42, United States code, Section 1983. The Court raises the issue sua sponte whether the facts support a cause of action in this regard. Having reviewed the record and the applicable law, the Court finds plaintiff's claims to border on frivolous but will afford the parties an opportunity to provide further briefing. Plaintiff should particularize the bases for his due process claims and shall be allowed thirty days to do so.

CONCLUSION

The Court, in considering the motions before the Court, has viewed the evidence in a light most favorable to plaintiff. No material facts in dispute, however, preclude the Court from granting defendants motions and dismissing plaintiff's claims in their entirety. Under the relevant law, plaintiff simply has failed to convince this Court that he timely submitted his claims of discrimination or that he alleges facts upon which a claim may be asserted under Title 18, United States Code, Section 2520. The Court, therefore, grants defendant's motions and dismisses these claims in their entirety.

/s/ George Arceneaux, Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LORENZA KNIGHT	CIVIL ACTION
VERSUS	NO. 89-3409
CITY OF NEW ORLEANS and WARREN G. WOODFORK	SECTION "K" (1)

ORDER

For the foregoing reasons;

IT IS ORDERED that:

1. Defendants' motion to dismiss plaintiff's discrimination claim as untimely is hereby *GRANTED*.

2. Plaintiff's motion for partial summary judgment on his claim under Title 18, United States Code, Section 2520, is hereby *DENIED* and defendants' cross-motion for partial summary judgment on this claim is hereby *GRANTED*.

3. Plaintiff shall file briefing no later than July 31, 1991, which particularizes his claims under the Fourteenth Amendment and Title 42, United States Code, Section 1983, including the legal bases therefore.

4. Defendants shall file a properly-noticed motion for summary judgment on plaintiff's remaining claims no later than August 21, 1991. Plaintiff shall file any opposition to this motion in accordance with the

Federal Rules of Civil Procedure and the local rules of this Court.

New Orleans, Louisiana, this 1st day of July, 1991.

/s/ George Arceneaux, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LORENZA KNIGHT	CIVIL ACTION
VERSUS	NO. 89-3409
CITY OF NEW ORLEANS and WARREN G. WOODFORK	SECTION "K" (3)

MEMORANDUM AND ORDER

Defendants, the City of New Orleans (the "City") and Superintendent of Police Warren G. Woodfork ("Woodfork"), filed a motion for summary judgment, seeking judgment as a matter of law on plaintiff Lorenza Knight's ("Knight") remaining claims. Having reviewed the memoranda in support and in opposition, the record, and the applicable law, the court finds the defendants' motion for summary judgment to have merit.[1]

BACKGROUND

The court recited the facts and procedural background of this case in its Memorandum and Order of July 2, 1991. The court, therefore, will not repeat them herein.

DISCUSSION

1. Plaintiff's Due Process Claims

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[1]The court finds it necessary to address plaintiff's intimation that this court may have pre-judged the merits of this motion. On the contrary, it has given all of plaintiff's claims serious consideration under applicable law.

Plaintiff Knight first contends that his involuntary retirement from the New Orleans Police Department constituted a denial of due process under the Fourteenth Amendment, and, thus, he seeks redress under 42 U.S.C. 1983. An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 313 (1950). In this case, Knight contends that the defendants deprived him of both liberty and property interests without due process.

a. Plaintiff's Property Interest

Tenured civil service employees have a property interest in their continued employment. Cleveland Bd. of Educ. v. Loudermill, 470 U. S. 532, 538-39 (1985). In order to satisfy the procedural due process requirement, an individual must be given an opportunity for a hearing before he is deprived of any significant property interest. Boddie v. Connecticut, 401 U. S. 371, 379 (1971). This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. Board of Regents v. Roth, 408 U. S. 564, 569 - 70 (1972); Perry v. Sindermann, 408 U. S. 593, 599 (1972). The United States Supreme Court clearly has indicated the prerequisites of such a hearing.

The Court, in Mathews v. Eldridge, 424 U. S. 319 (1976), held that, in general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action, where one, who has been deprived of a property interest, is later entitled to a full administrative hearing and judicial review under state law. Id. at 343. More specifically, the United States Supreme Court has

> stated that the pretermination hearing need not definitively resolve the property of the discharge. It should be an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action . . . . . .The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Loudermill, 470 U. S. at 545-46 (citations omitted). Therefore, Knight, as a tenured civil service employee, has a property interest in his continued employment with the New Orleans Police Department, and is entitled to notice and a hearing as articulated by the Supreme Court in Loudermill.

b. Plaintiff's Liberty Interest

A constitutional deprivation of liberty occurs when there is some injury to employment or employment opportunities in addition to damage to reputation and a subsequent denial of procedural due process to redress that injury. In re Selcraig, 705 F. 2d 789, 796 (5th Cir. 1983). If an employee's reputation was damaged by the truth, even though procedures were deficient, the injury is not compensable under 42 U.S.C. 1983. Rather, an employee could obtain only nominal damages for the procedural deprivation itself. Myrick v. City of Dallas, 810 F. 2d 1382, 1385 (5th Cir. 1987) (quoting Carey v. Piphus, 435 U. S. 247, 263, 266, (1978). Knight contends that the New Orleans

Police Department's press release of information regarding his involuntary retirement, as well as the subsequent newspaper articles concerning the same, damaged his reputation and limited his employment opportunities.

Knight, however, fails to establish that any of the information conveyed to the public by the police press release or the corresponding newspaper articles is untrue. Therefore, because the truth was the source of the damage to Knight's reputation, only nominal damages would be available under 42 U.S.C. 1983 if a deprivation of procedural due process occurred.

Defendants, however, would not deprive Knight of liberty without due process if, in a hearing about his dismissal, he had an adequate opportunity to preserve or regain his reputation, as well as his job. Plaintiff's liberty interest claim, therefore, is inextricably intertwined with the adequacy of the pretermination proceedings regarding his property interest claim.

c. Notice and a Hearing

Defendants did not violate Knight's due process rights in his pretermination proceedings. Under the applicable legal standards, Knight received sufficient notice and an adequate opportunity to be heard to satisfy the requirements of procedural due process. The undisputed facts show that during the initial investigation, Knight received notice of the nature and reasons for the investigation. In fact, plaintiff read a lengthy prepared statement in response, which demonstrated such kn wledge. Moreover, in a letter dated October 20, 1988 (following the investigation and a prior to the disciplinary hearing), Superintendent Woodfork informed Knight of the results of the investigation and the charges made against him. Defendants, therefore,

gave Knight sufficient notice of the charges against him prior to involuntary retirement.

Defendants also afforded Knight an adequate opportunity to be heard. At the disciplinary hearing before Superintendent Woodfork on November 7, 1988, Knight again read a prepared statement in response to the charges made against him, Knight and Superintendent Woodfork further discussed the charges, and Knight's attorney made a brief statement. The actions provided an adequate opportunity for Knight to be heard prior to his discharge.

Plaintiff further contends that, because Superintendent Woodfork allegedly prejudiced this case, the proceedings did not represent a meaningful opportunity to be heard. Knight, however, was not entitled to have his pretermination hearing conducted by a fair and impartial decision maker; his discharging supervisor is allowed to conduct such a hearing. Duchesne v. Williams, 849 F. 2nd 1004, 1005 (6th Cir. 1988), cert. denied, 489 U. S. 1081 (1989); see 1 M. Schwartz 3.14 at 219 (2d ed. 1991). Consequently, Knight's claim that Woodfork had make up his mind prior to the disciplinary hearing of November 7, 1988, and, thus, constituted a biased decision maker is of no consequence.

Knight, citing Levine v. Town of W. Hartford Police Dept., 541 F. Supp. 741 (D. Conn. 1982), also contends that when specific regulations and laws govern municipal employment, a municipality is lawfully obliged to comply with the procedures outlined in those regulations and laws. This court, however, finds no violation of any applicable regulation or law in this matter. As discussed above, Knight had sufficient notice of the charges against him; therefore, the defendants satisfied the requirement that the law enforcement officer being investigated know the nature of the investigation at its commencement. La. Rev. Stat. Ann.

40:2531 (B) (1) (West 1991). In addition, the entitlement Knight claims to a copy of any recording upon written request is misplaced; he is entitled to a copy of the recording of his statements at the interrogation, but not a copy of the recorded telephone conversation. La. Rev. Stat. Ann. 40:2531 (B) (3) (West 1991). Lastly, in its Memorandum and Order of July 2, 1991, this court disposed of any and all claims based upon the alleged illegality of the interception of Knight's phone conversation with Officer John Reilly; therefore, public disclosure of this conversation does not run afoul of the law.

In sum, because defendants afforded Knight sufficent notice and an adequate opportunity to be heard, plaintiff received due process. Accordingly, the court must dismiss Knight's deprivation of due process claim.

2. Plaintiff's Equal Protection Claim

Plaintiff Knight next contends that his involuntary retirement from the New Orleans Police Department constituted a denial of equal protection of the laws under the Fourteenth Amendment, and, thus, he seeks redress under 42 U.S.C. 1983. Knight claims that Superintendent Woodfork, due to racial prejudice, treated whites and blacks disparately.

Section 1983 requires that "discriminatory intent, as well as disparate impact, must be shown in employment discrimination suits brought against public employers . . . ." Castaneda v. Pickard, 648 F. 2d 989, 1000 (5th Cir. Unit A June 1981). Knight, however, has not sufficiently made such allegation, no less raised triable issues of material fact, of such discriminatory intent or disparate impact. Consequently, the court finds that the pleadings and the record in this case do not support Knight's contention that

the defendants intentionally discriminated against him under the relevant case law. The court, therefore, must dismiss Knight's denial of equal protection claim.

3. Plaintiff's Freedom of Speech Claim

Plaintiff Knight belatedly contends that his involuntary retirement from the New Orleans Police Department also violated his right of free speech under the First Amendment. Knight, however, has failed to assert this issue until this motion; his claim of a First Amendment freedom of speech violation, therefore, is not cognizable. Nevertheless, even if Knight had sufficiently pled this claim it is without merit.

In applying the test of Pickering v. Board of Educ., 391 U. S. 563, 568 (1968), the interest of the City, as an employer, in promoting the efficiency of the public services it performs through its employees, outweights Knight's right to engage in racist and sexist speech in the workplace. The defendants, therefore, did not violate Knight's First Amendment rights.

4. Plaintiff's Pendent State Law Claims

Because the court has dismissed Knight's remaining federal claims, only his state law claims remain. When federal law claims in an action based on federal question jurisdiction are eliminated and only state law claims remain, the federal court should not continue to exercise jurisdiction. Federal courts may relinquish jurisdiction by either dismissing the case without prejudice or remanding the case to state court. Carnegie-Mellon Univ. v. Cohill, 484 U. S. 343, 350-51 (1988). The United States Supreme Court in United Mine Workers of Am. v. Gibbs, 383 U. S. 715, 726 (1966), stated:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state law claims should be dismissed as well.

Accordingly, this court must dismiss Knight's state law claims without prejudice. Knight is free to seek his remedies in state court and, in fact, has done so; he has instituted an action presently pending in state court. Therefore, because the state court will provide an adequate forum for Knight's state law claims, remanding this case to state court is not necessary, and there is no prejudice in dismissing those claims.

CONCLUSION

The court, in considering the motion before it, has viewed the evidence in a light most favorable to plaintiff. No material facts in dispute, however, preclude the court from granting defendants motion for summary judgment. The court, therefore, *GRANTS* the motion and dismisses plaintiff's claims in their entirety.

IT IS SO ORDERED.

New Orleans, Louisiana, this 24th day of October, 1991.

/s/ George Arceneaux, Jr.

GEORGE ARCENEAUX, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3921

LORENZA HOLMES KNIGHT

Plaintiff-Appellant,

versus

CITY OF NEW ORLEANS, NEW ORLEANS POLICE DEPARTMENT and WARREN G. WOODFORK,

Defendant-Appellees.

Appeal from the United States
District Court
for the Eastern District of Louisiana
(CA-89-3409-K)

Before POLITZ, Chief Judge, SMITH and BARKSDALE, Circuit Judges.

PER CURIAM:*

This matter is before the court on appeal by Lorenza Holmes Knight from adverse summary judgments rejecting his 42 U.S.C. 2000e, federal wiretapping, and constitutional claims. Having considered the briefs, oral arguments of counsel, and pertinent parts of the record, we conclude that for the reasons assigned and authorities cited by the district

court judge in his Orders signed and entered on July 2, 1991, and October 25, 1991, the judgment appealed is AFFIRMED.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LORENZA KNIGHT	CIVIL ACTION
VERSUS	NO. 89-3409
CITY OF NEW ORLEANS ET AL	SECTION "K" (1)

AFFIDAVIT

BEFORE ME NOTARY PUBLIC, personally came and appeared John Reilly who after being duly sworn did depose and say that:

He is a person of full age of majority and resident of the State of Louisiana;

That on August 6, 1988 at approximately 11:30 p.m. he was employed by the New Orleans Police Department and was assigned to the Communications Section, Command Desk;

AFFIANT did further say that on that date and time he engaged in a telephone conversation with Captain Lorenza H. Knight;

AFFIANT also did further say that he did not know that the above mentioned telephone conversation was being tape recorded;

AFFIANT did further say that because of the telephone

system utilized on the Command Desk it was impossible for him to know the telephone number upon which this telephone conversation took place;

AFFIANT further sayeth that at no time did he consent to the tape recording of the telephone conversation between himself and Captain Lorenza H. Knight;

FURTHER AFFIANT SAYETH NOT.

/s/ John Reilly

JOHN REILLY
AFFIANT

WITNESSES:

/s/ Julie Wischan

/s/ Beth Griffin

Sworn to and subscribed before me at
New Orleans, Parish of Orleans, Louisiana
this 10th day of October, 1990.

/s/ June Mary Selzer

June Mary Selzer

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LORENZA KNIGHT	CIVIL ACTION
VERSUS	NO. 89-3409
CITY OF NEW ORLEANS	SECTION "K" (1)

AFFIDAVIT

BEFORE ME NOTARY PUBLIC, personally came and appeared Lorenza Holmes Knight who after being duly sworn did depose and say that:

He is a person of full age of majority and resident of the State of Louisiana;

AFFIANT did further say that on August 6, 1988 he was employed as a captain by the New Orleans Police Department and had been an employee of the New Orleans Police Department in excess of 23 years;

AFFIANT did further say that on the above mentioned date at 11:30 p.m. in response to a call on his beeper he placed a call, from a telephone outside of the New Orleans Police Department, to Officer John Reilly at the Communications Section, Command Desk;

AFFIANT also did further say that he did not know that his telephone conversation with Officer Reilly was being tape recorded;

AFFIANT did further say that at no time did he consent to the tape recording of his telephone conversation with Officer John Reilly;

AFFIANT did further say that at no time did he consent to the contents of the telephone conversation with Officer Reilly being disclosed to any person, firms or corporations, other than Officer Reilly;

AFFIANT further sayeth that in the mid-1970's for a period of approximately six months he was in charge of the Command Desk, but at that time, the Command Desk was physically located in a different location, utilizing an entirely different telephone system than the one being utilized on August 6, 1988;

AFFIANT also sayeth that at the time he was in charge of the Command Desk in the mid-1970s, he did not know that telephone conversations on the Command Desk were being recorded nor was he given any training, instructions or directions into the operations and functions of the Command Desk.

FURTHER AFFIANT SAYETH NOT.

/s/ Lorenza Holmes Knight

LORENZA HOLMES KNIGHT
AFFIANT

WITNESSES;

/s/ Julie Wischan

/s/ Beth Griffin

Sworn to and subscribed before me at
New Orleans, Parish of Orleans, Louisiana,
this 17th day of October, 1990

/s/ June Mary Selzer

June Mary Selzer

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LORENZA H. KNIGHT	CIVIL ACTION
VERSUS	NO. 89-3409
CITY OF NEW ORLEANS ET AL	SECTION "K" (3)

AFFIDAVIT

BEFORE ME, Notary Public, personally came and appeared Gerard A. Salles, Sr., 132 Cawthorn Drive, Slidell, LA, who after being duly sworn did depose and say that:

On July 1, 1990, he retired from the New Orleans Police Department with the title of Major;

That from 1969 until the time of his retirement he was assigned to the Internal Affairs Division of the New Orleans Police Department;

That in August, 1988, he was Commander of the Internal Affairs Division;

That shortly after August 6, 1988, he was contacted by Major Calvin Galliano who advised him of an incident involving a conversation between Captain Lorenza Holmes Knight and Officer John Reilly which had been tape recorded;

That Major Galliano directed him to conduct an

investigation concerning the incident and that Superintendent Woodfork had a copy of the tape recording;

That shortly thereafter he went to Superintendent Woodfork's office and at that time Superintendent Woodfork played the tape recording for him, which recording was partially inaudible;

That Superintendent Woodfork informed him that Sergeant Melvin Howard had the original copy of the recording of the conversation and would bring it to him;

That when Sergeant Howard brought his copy of the recording to him, it also was partly inaudible so he had one of his officers assigned to Internal Affairs Division make another recording from the original recording located in the Electronics Section;

That Pursuant to the Standard Operating Procedures of the Operations Manual of the New Orleans Police Department, on September 6, 1988, Captain Knight was required to give a recorded statement to him;

That at that beginning of the recorded statement from Captain Lorenza Holmes Knight, Knight demanded to know the nature of the charges against him;

That at that time Captain Knight was not advised of the nature of the charges against him;

That upon the conclusion of taking Knight's statement he informed Superintendent Woodfork that, in his opinion, Captain Knight had violated none of the rules and regulations of the New Orleans Police Department;

That upon hearing Affiant's conclusions regarding his opinion, Superintendent Woodfork became very angry and set up a meeting with members of the City Attorney's office to determine what specific departmental charges could be brought against Captain Knight;

That he was not allowed to give Captain Knight copies of the tape recordings of the conversation between Captain Knight and Officer Reilly or any of the other evidence against Captain Knight;

That to his personal knowledge, information and belief a copy of this recording was played to members of the public, the media, and at meetings of the Black Organization of Police and that only members of the New Orleans Police Department in control of a copy of the subject tape recording could have disseminated the contents of the taped conversation between Captain Knight and Officer Reilly to members of the public and media;

That during the course of his investigation he became aware of a tape recorded conversation between Captain James Howley and Officer John Reilly that occurred at the same time as the conversation between Captain Lorenza Holmes Knight and Officer John Reilly;

That he brought the conversation between Captain Howley and Officer Reilly to the attention of Superintendent Woodfork and an investigation of Captain Howley was initiated at the order of Superintendent Woodfork;

That on September 22, 1988, he obtained a recorded statement from Captain James Howley and at that time Howley demanded to know the nature of the charges against him;

That Howley was advised of the nature of the charges against him;

That affiant was partially responsible for rewriting the Standard Operating Procedures of the New Orleans Police Department prior to the Knight incident and was fully and totally familiar with the contents thereof;

That the present Department Rule regarding discrimination requires that an affirmative action be taken by an officer before he can be in violation of this Rule, and that speech, alone, is not sufficient to constitute discrimination as an Officer has a right to Freedom of Speech;

That Captain Knight's conversation with Officer Reilly did not constitute a public statement even though it involved Police Business since it was a conversation between two members of the police department who had been friends for over twenty years and was not disseminated, nor intended to be disseminated, by either of the two parties to any members of the public;

That at the time of the investigation, and at all times subsequent, he is of the opinion that Captain Lorenza Holmes Knight did not violate any of the rules and regulations of the New Orleans Police Department during his taped telephone conversation with Officer John Reilly.

Affiant did further say that in his capacity as Commander of the Internal Affairs Division he became aware of an incident that occurred before the Knight incident wherein Sergeant Chris Maurice, a black officer, did, according to statements taken from several of Maurice's neighbors, use racial slurs against those neighbors by calling them "black Mother-Fuckers" and did pull and point his gun at them; and;

That the discipline received by Sergeant Maurice from the New Orleans Police Department was suspension for three days and he was subsequently promoted to the rank of Lieutenant.

Affiant did also say that he, in his capacity of commander of the Internal Affairs Division, became aware of an incident that occurred a few months after the occurrence of the Knight incident wherein Lt. Mitchell Dusset, a black, did according to statements of several other officers, in a public restaurant and in front of members of the public, use racial slurs against several subordinate white officers by calling them "white Mother-Fuckers";

That as a result of that incident the discipline against Lt. Dusset was a letter of reprimand; and

That shortly after the incident set forth above, Lt. Dusset was promoted to the rank of Captain.

Further affiant saith not.

/s/ Gerard A. Salles, Sr.
GERARD A. SALLES, SR.

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 6TH DAY
OF SEPTEMBER, 1991.

/s/ Dale W. Poindexter
NOTARY PUBLIC

APPENDIX G

18 U.S.C. 2510, et seq.

2511. Interception and Disclosure of Wire, Oral, or Electronic Communication Prohibited.

(1) Except as otherwise specifically provided in this chapter any person who --

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when --

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

* * * * * *

(iv) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

* * * * * *

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication

is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

* * * * * *

2520. Recovery of Civil Damages Authorized

(a) In general. -- Except as provided in section 2511 (2) (a) (ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief. -- In an action under this section, appropriate relief includes --

(1) such preliminary relief and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

APPENDIX H

LOUISIANA STATUTES ANNOTATED/REVISED STATUTES 15:1301, et seq.

1303. Interception and Disclosure of Wire or Oral Communications Prohibited

A. Except as otherwise specifically provided in this Chapter, it shall be unlawful for any person to:

(1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire or oral communication:

(2) Willfully use, endeavor to use, or procure any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when;

(a) Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(b) Such device transmits communications by radio, or interferes with the transmission of such communication;

(3) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection; or

(4) Willfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to

know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection. Any person who violates the provisions of this Subsection shall be fined not more than ten thousand dollars and imprisoned for not less than two years nor more than ten years at hard labor, without benefit of probation, parole, or suspension of sentence.

B.

* * * * * *

(3) It shall not be unlawful under this Chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. Such a person acting under color of law is authorized to possess equipment used under such circumstances.

(4) It shall not be unlawful under this Chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception, unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of the state or for the purpose of committing any other injurious act.

* * * * * *

1307. Prohibition of Use as Evidence of Intercepted Wire or Oral Communications

Whenever any wire or oral communication has been

intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this Chapter.

* * * * * *

**1312. Recovery of Civil Damages Authorized*

A. Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this Chapter shall:

(1) Have a civil cause of action against any person who intercepts, discloses, or used, or procures any other person to intercept, disclose, or use such communications, and be entitled to recover from any such person:

(a) Actual damages, but not less than liquidated damages computed at the rate of one hundred dollars a day for each day of violation or one thousand dollars, whichever is greater; and

(b) Punitive damages; and

(c) A reasonable attorney's fee and other litigation costs reasonably incurred.

Supreme Court, U.S.
FILED
JAN 15 1993
OFFICE OF THE CLERK

NO. 92-808

In the Supreme Court of the United States

OCTOBER TERM, 1992

LORENZA HOLMES KNIGHT,
Petitioner,

versus

CITY OF NEW ORLEANS AND
WARREN G. WOODFORK
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the recording of telephone conversations made to the command desk of the New Orleans Police Department, involving exclusively police business, is within the "business exception" contained in 18 U.S.C. § 2510 (5) (a) (ii).

2. Whether the petitioner received sufficient notice and an adequate hearing before his separation from employment to satisfy the requirements of procedural due process.

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

1. Lorenza Holmes Knight, petitioner

2. City of New Orleans, respondent

3. Warren G. Woodfork, respondent

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STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition In Courts Below

Plaintiff[1] brought this suit against defendants on August 2, 1989. The complaint alleged a cause of action under the civil action section of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, (18 U.S.C. §2520) that provides relief for any person whose wire, oral, or electronic communication is intercepted, disclosed or intentionally used in violation of Title III. Plaintiff amended his complaint on August 30, 1989. The amended complaint alleged a cause of action under Title VII of the Civil Rights Act of 1964 (42 U. S. C. §2000(e)) for unlawful job discrimination on the basis of race. Plaintiff again amended his complaint on November 9, 1989. The second amended complaint alleged a cause of action under the Civil Rights Act of 1866 (42 U.S.C. §1983) for deprivation of a liberty interest without procedural due process of law.

On September 4, 1990, defendants filed a motion to dismiss plaintiff's Title VII claim based upon plaintiff's failure to file a charge with the Equal Employment Opportunity Commission within the statutorily mandated time limitations. While the District Court had defendants' motion to dismiss under submission, both plaintiff and defendants filed partial summary judgment motions regarding the wire-tapping claims.

The District Court granted both of defendants' motions, and entered a judgment on July 1, 1991 ordering

---

[1] For purposes of this brief, Petitioner Knight will be referred to as "Plaintiff" and Respondents City of New Orleans and Warren G. Woodfork as "Defendants."

plaintiff's Title VII and wire-tapping causes of action dismissed. (Appendix A to Plaintiff's Petition for Writ of Certiorari (Plaintiff's Petition)). In the order of dismissal, the district court additionally ordered plaintiff to file a brief particularizing his remaining claim for denial of procedural due process. The district court also gave defendants a deadline to file a motion for summary judgment regarding plaintiff's remaining claims.

On August 19, 1991 defendants filed a motion for summary judgment regarding plaintiff's remaining claim under 42 U.S.C. § 1983. On October 24, 1991, the district court granted defendants' motion for summary judgment and entered a judgment dismissing plaintiff's remaining claims in their entirety. (Appendix B to Plaintiff's Petition). The Fifth Circuit Court of Appeals affirmed the district court's judgment in a per curiam opinion. (Appendix C of Plaintiff's Petition).

B. Statement of Facts

Plaintiff is a former employee of the City of New Orleans ("City") employed with the New Orleans Police Department ("NOPD") from 1964 until November 1988. His employment included the position of commander in the NOPD Communications Division during 1977. In 1986 plaintiff became a field supervisor. This position's duties included acting as superintendent of the NOPD at times when Superintendent Woodfork was off duty.

Plaintiff worked as a field supervisor on August 6, 1988. While working in the field, plaintiff received a page from Police Officer John Reilly, originating from the Communications Division command desk of the NOPD. In response to the page plaintiff left his car and called Reilly from a public telephone booth at approximately 11:00 p.m.

The conversation between the plaintiff and Reilly concerned an incident involving a police officer from the Fifth District, Cathy Carter. The telephone conversation concerned strictly police business. Plaintiff and Reilly had the following conversation.

Knight	-	Who's in 527
Reilly	-	Cathy Carter
Knight	-	Black?
Reilly	-	Yes, She's not usually like that...
Knight	-	They are usually like that, John it's a fucking nigger
Reilly	-	Uh huh
Knight	-	It's a shame to say it but a fucking nigger is a nigger and ain't worth a shit, you know.

The conversation continued,

Knight	-	I want paper work typed up on it explaining in detail exactly what she did and we'll send it down to the district in the form of a complaint.
Reilly	-	Okay
Knight	-	The bitch is not going to get away with this kind of stuff, you know, I don't give... I'm tired of these fucking niggers.

The NOPD taped the telephone line and recorded the conversation because all telephone instruments are taped in the communications operation and command desk with the exception of a telephone made available for personal telephone calls. The NOPD's recording system is utilized to preserve and accurately recall messages pertaining to emergencies or to other official police business including departmental and personnel investigations. All personnel of the NOPD know that the communications lines are tapped as a matter of common knowledge, and all personnel who work in the communications division are informed that the lines are tapped.

The NOPD became aware of the plaintiff's racial comments contained on the tape from an investigation conducted by Sergeant Melvin Howard of the NOPD's Fifth District. As Police Officer Cathy Carter's platoon commander, Howard's responsibilities included investigating a charge of misconduct against Carter. Part of his investigation included reviewing recorded radio and telephone conversations between Carter and the police dispatcher. While listening for a taped communication between Carter and the police dispatcher, Howard came upon the above-described telephone conversation between the plaintiff and Reilly. Howard made a cassette recording of the conversation that ultimately reached the desk of Superintendent Woodfork. After hearing the tape, Woodfork ordered the NOPD Internal Affairs Division ("IAD") to determine whether the plaintiff had made the statements contained on the tape. Major Gerald Salles, the commander of IAD, directed his subordinate Sergeant Mason Spong to return to communications and make another copy of the conversation. A transcript of the taped converstation was made by Salles secretary.

Salles contacted Knight to inform him that Wood-

fork had heard the tape and wanted the plaintiff to give a statement. Approximately two days later the plaintiff and Salles met on September 6, 1988 to record a sworn statement. First, plaintiff listened to the recorded statement and then admitted that he had made the statements on the tape. When asked by Salles for reasons for making the statements Knight read into the record a prepared statement.

After reviewing the transcript of plaintiff's statement and plaintiff's admissions, Woodfork ordered a formal investigation of the plaintiff because of the racial comments made on the recorded police line. At the conclusion of Major Salles' investigation, the defendants contacted plaintiff by letters dated September 14, 1988 and October 20, 1988 and charged him with violations of NOPD rules and procedures resulting from the comments contained in the taped conversation. The October 20th letter instructed plaintiff to appear for a disciplinary hearing before Woodfork on November 7, 1988.

The disciplinary hearing occurred, as scheduled, on November 7, 1988. Defendants tape recorded and later transcribed the entire hearing. Plaintiff appeared represented by counsel. During the hearing, Superintendent Woodfork told plaintiff the results of the investigation and the changes that arose from the investigation. In response, plaintiff again read a prepared statement to defend against the charges. After plaintiff completed reading his statement Woodfork and plaintiff discussed the charges further. Plaintiff's attorney made a brief statement. Woodfork then concluded the hearing.

By letter dated November 15, 1988 Woodfork informed plaintiff of his decision to involuntarily retire plaintiff for violation of Rule 6 para. 3-Public Statements and

Appearances and Rule 2 para. 4-Discrimination. Plaintiff appealed the Superintendent's decision to the New Orleans Civil Service Commission, who in turn dismissed plaintiff's appeal upholding the Superintendent's decision.

SUMMARY OF THE ARGUMENT

Plaintiff failed to show any special or important reason why this Court should grant his Petition. He merely argues that the district court and Fifth Circuit holdings were wrong. This assertion is insufficient to merit the granting of a writ of certiorari.

In any event, the holding of the district court and Fifth Circuit were correct. The New Orleans Police Department has the authority to record telephone conversations involving police business between their employees for use in internal investigations of police misconduct. The courts below found that plaintiff's recorded telephone conversation involved police business, and that defendants lawfully used the recording as part of an internal police personnel investigation. Thus, defendant's actions fell within the business exception to Title III found at 18 U.S.C. § 2510 (5) (a) (ii).

Regarding plaintiff's procedural due process claim, the lower courts correctly found that plaintiff received sufficient notice and an adequate hearing before his involuntary retirement. The transcripts of plaintiff's initial affairs interview and the pre-termination hearing before Superintendent Woodfork establish that plaintiff knew what he did wrong and why defendants disciplined him. Further, plaintiff had every opportunity to defend his actions during his pre-termination hearing, and guard against factual mistakes.

Summary judgment is appropriate since plaintiff, the party opposing the motion, cannot establish a prima facie case either under Title III, or under 42 U.S.C. § 1983.

ARGUMENT

A. Plaintiff's Petition Does Not Present Any of the Requisite Factors Which the Court Considers in Granting a Petition for Writ of Certiorari

The Supreme Court grants a Petition for Writ of Certiorari when the case presents "special or important reasons" for granting of the writ. Sup.Ct.R. 10.1. None of the considerations that weigh in favor of granting a writ are present in the instant case: 1) Plaintiff does not cite to any cases where the district courts or courts of appeal are in conflict;[2] 2) the Fifth Circuit did not depart from the accepted and usual course of judicial proceedings, nor did it sanction such a departure by the district court; and 3) nothing in this case presents an important, new decision of federal law meriting Supreme Court review.

This case presents an unremarkable procedural due process claim coupled with a frivolous federal wire tap allegation. Plaintiff fails to point out anything exceptional about the holding below. In fact, Plaintiff does not even attempt to demonstrate why any of the factors in Sup.Ct.R. 10.1 should apply to this case, but merely asserts that the district court and Fifth Circuit reached the wrong decision. Even if that assertion were true, it would not be sufficient to invoke this Court's review, absent one of the factors listed in Sup.Ct.R. 10.1 or other extraordinary circumstances that are not present here.

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[2] Under Sup.Ct.R. 10.1, the Court will consider exercising its discretionary review if the decisions of two circuit courts are in conflict, something which Plaintiff does not even contend.

B. The District Court Properly Granted Summary Judgment as to Plaintiff's Wire-Tapping Claim under 18 U.S.C. § 2520, and the Fifth Circuit Properly Affirmed the District Court's Holding.

Plaintiff argues that the lower courts erred by failing to consider the Louisiana wire-tapping statute, La. R.S. 15:1301, before concluding that plaintiff made his telephone conversation in the ordinary course of business. Plaintiff maintains that Louisiana law prohibits the conduct that the lower courts ruled valid. Defendants maintain that the lower courts applied the correct law. Second, even assuming state law applies, the state statute relied upon by plaintiff mirrors the federal statute regarding the "business exception." See La. R.S. 15:1302 (a) (ii). Accordingly, the district court correctly granted the defendants summary judgment dismissing plaintiff's claim under 18 U.S.C. § 2520.

C. The District Court Properly Granted Summary Judgment as to Plaintiff's Procedural Due Process Claims under the Fourteenth Amendment, and the Fifth Circuit Properly Affirmed the District Court's Holding.

Plaintiff argues that defendants did not provide sufficient notice of the charge of discrimination until the date of his discharge, and did not give him an adequate hearing to clear his name or the opportunity to refute the charge of discrimination. Defendants maintain that the district court correctly ruled that plaintiff in his pre-termination hearing had an adequate forum to preserve or regain his reputation as well as his job.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed 2d 494 (1985), the Supreme Court defined the minimum procedures due prior

to the discharge of a tenured public employee. According to the Court, a pre-termination hearing should be held. This hearing need not be elaborate, and it may be something less than a full evidentiary hearing, in which the employee is entitled to a full administrative hearing and judicial review. In essence, this pre-termination hearing should be an initial inquiry whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. The purpose of the pre-termination hearing is not to definitively resolve the propriety of the discharge, but to guard against mistaken decisions.

The pre-termination hearing does not contemplate a neutral arbiter of the dispute. As discussed in *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988), the pre-termination hearing merely allows the employee a "right-of-reply" to the charges against him to guard against mistaken assumptions by the employer. Any alleged bias on the part of the employer conducting the hearing is considered during the post termination hearing.

The record establishes that Superintendent Woodfork's actions during the investigation of plaintiff were consistent with the requirements set forth in *Loudermill*. From the outset of the investigation, plaintiff had notice of the charges. As reflected in the transcript of the September 6, 1988 statement taken by Major Salles, Plaintiff knew the reasons for his investigation.

> Q. I would like to bring to your attention on August 6, 1988, you had a conversation with Police Officer John Reilly, assigned to the Command Desk in the Central Complaint Bureau. Prior to that, Officer Reilly had paged you on your beeper to give him a call. That conversation was recorded and at this time I would like to stop this tape

momentarily and allow you to hear the conversation you and Officer Reilly had so you will know what we are talking about. The tape is now being stopped and it is 11:06 a.m. We are now returning back to the tape and the time is 11:14 a.m. Captain Knight has had the opportunity to listen to the recording of a conversation between himself and John Reilly. In that conversation involved Officer Reilly explaining to Captain Knight, Police Officer Cathy Carter, assigned to Car 527, and her failure, refusal to handle a call to which she was dispatched to, her subsequent being ordered to handle that call and again refusing to handle it and in fact leaving and going home instead of handling the call. During the conversation Captain Knight asked if the individual was black and he stated... Reilly said yes, but that was not like her to be that way and Captain Knight replied, yes they are that way because she was a fucking nigger and they all get that way. And then replied a fucking nigger ain't shit and that he's tired of these niggers. Captain Knight, do you recall this conversation?

A. I recall having a conversation with Officer Reilly. I was not aware of exactly what I said until you played the tape recorder for me.

Q. Do you admit that this is your voice on the tape and that you did in fact say this statement?

A. Yes.

Q. Do you have any comments you'd like to make relative to the reason you made this statement, etc.?

A. Yes, I have a prepared statement I'd like to read into the tape.

As reflected in the transcripts of the investigation and pre-termination hearing, plaintiff had notice of the charges against him and the opportunity to respond to the charges during a pre-termination hearing. Accordingly, the district court correctly granted the defendants a summary judgment dismissing plaintiff's claim under 42 U.S.C. 1983.

CONCLUSION

Plaintiff has not shown any "special or important reasons" why a writ of certiorari should be granted in this case. Sup.Ct.R. 10.1. Plaintiff has not alleged (i) any conflict between the circuits, (ii) departure by the Fifth Circuit from the accepted and usual course of judicial proceedings, or (iii) a sanction of such a departure by the district court. Denial of the writ of certiorari will work no injustice in the instant case, since the decisions of the district court and court of appeals are clearly correct under existing law. For these reasons, the Court should deny the Petiton for Writ of Certiorari.

Respectfully submitted,

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